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Courts generally recognize the highly political nature of legislative apportionment schemes and thus allow legislatures a great deal of leeway in drawing electoral districts.[1] In two categories of cases, however, the courts have demonstrated a greater readiness to question the constitutionality of apportionment plans. First, they have upheld challenges to the validity of voting districts that deviate significantly from the "one person, one vote" standard[2] and, second, they have carefully examined claims that a districting plan was formulated along racial lines.[3] Within this second category, particularly complex questions arise when state legislatures establish districts along racial lines in order to increase the political power of minority groups that have been subjected to racial discrimination.

The issue of "benign" or "corrective" racial redistricting recently came before the Second Circuit in *United Jewish Organizations of Williamsburgh, Inc. v. Wilson.*[4] In *Wilson,* plaintiff challenged a redistricting scheme[5] that was designed to give Kings County, New York, approximately proportional representation[6] by race in the state legislature. Plaintiff represented members of a White community[7]

1. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 586 (1964); Gaffney v. Cummings, 412 U.S. 735 (1973). In *Gaffney,* the Court refused to strike down a reapportionment plan that attempted to achieve a rough approximation of the statewide political strength of the two major political parties in the state legislature. The Court observed that "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign states." 412 U.S. at 754.

2. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

3. *See, e.g.,* Whitcomb v. Chavis, 403 U.S. 124 (1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Since the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973p (1970), the federal courts have been forced to take a more active part in these decisions.

4. 510 F.2d 512 (2d Cir.), *cert. granted,* 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975) (No. 75-104).

5. The challenged scheme was developed after an earlier plan had failed to receive the approval of the United States Attorney General as required under section 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973c (1970). 510 F.2d at 515-16. The case here, however, arose not as the result of proceedings under the Act, but instead as an independent suit relying on constitutional objections to the proposed scheme. 510 F.2d at 519-20.

6. "Proportional representation" is used here to describe an apportionment scheme designed to permit racial groups to control election results in a number of districts roughly proportional to their population. Such a scheme is intended to produce a legislative body proportioned according to race.

7. The plaintiff filed suit on behalf of the members of the Hasidic community in the Williamsburgh section of Brooklyn, New York. 510 F.2d at 514. However, the court, explaining that a community has no right to recognition as a community and therefore has no claim to being left intact within one district, denied the plain-

that, under the redistricting scheme, was equally divided between two districts so that each district would contain a controlling non-White majority.[8] Plaintiff alleged that such a division diluted its voting power on the basis of race in violation of the fifteenth amendment. Furthermore, it claimed that the use of racial criteria to create invidious restrictions against its members as White voters violated the equal protection clause of the fourteenth amendment.

The district court dismissed the complaint, holding that the plaintiffs had suffered no cognizable injury and that "racial considerations" had been permissibly employed "to correct a wrong."[9] On appeal, the Second Circuit found that the plan would not unconstitutionally dilute the voting strength of White voters in Kings County because, even if the districts with non-White majorities elected non-White representatives, "there would be no disproportionately non-White representation in either house" of the state legislature.[10] Furthermore, the court held that employment of a proportional representation scheme was permissible to correct the effects of discrimination against non-Whites that had diluted non-White representation in Kings County.[11]

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tiff standing as a representative of Hasidic voters. 510 F.2d at 520-22. The court instead granted standing to the members of the group as White voters complaining of a denial of equal protection and an abridgment of their right to vote on account of race or color. 510 F.2d at 521-22. For the purposes of this Note, only the claim as White voters is significant.

8. The challenged redistricting plan contained seven assembly and three senate districts with non-White majorities of at least 65 per cent. The use of this figure seems to have been based on the premise that, given rates of voter registration and turnout, anything less would render uncertain the power of the non-White majority to control election results in those districts. 510 F.2d at 526 (Frankel, J., dissenting). The plaintiff community's members were divided between two senate and two assembly districts, all of which thereby had controlling non-White majorities. 510 F.2d at 523 n.21.

9. 377 F. Supp. 1164, 1166 (E.D.N.Y. 1974).

10. 510 F.2d at 523. The Court explained that the population of Kings County was 64.9 per cent White, 24.7 per cent Black, and 10.4 per cent Puerto Rican. Under the original plan, only 1 of the 10 senate districts contained a "substantial" non-White majority of 65 per cent, while under the revised plan, 3 of the 10 contained such majorities. The court felt that this percentage of the districts compared favorably to the 35.1 per cent total non-White population in the county. Out of 22 assembly districts, 7 had more than 50 per cent non-White population under the original plan, while under the revised plan 5 districts had 75 per cent non-Whites and 2 had 65 per cent non-White majorities. 510 F.2d at 523 n.21.

11. Specifically, the court explained that under the originally proposed districting plan, New York had "dilut[ed] nonwhite representation through the use of unlawful devices in and prior to 1968," and caused the "underrepresentation of race." 510 F.2d at 525.

Judge Frankel dissented on the ground that proportional representation by race was an unconstitutional objective, and pointed out that the scheme had been supported by neither a rational basis nor a compelling need rationale. He argued further that the state legislature had not found the racial quota of 65 per cent either necessary or appropriate to correct a wrong, and that the legislature only developed this particular plan to satisfy the Attorney General. 510 F.2d at 529.

Wilson raises two questions that are basic to the use of "benign" racial classifications in drawing legislative districts. First, is there a constitutional right to proportional representation and, second, if there is no such right, are there circumstances under which a scheme devised to provide proportional representation is constitutionally permissible. This Note will demonstrate that, while the Supreme Court recognizes the constitutional right of each individual to participate on an equal basis in the community's political process and to enjoy an undiluted vote, it denies any constitutional right of groups to proportional political representation. It will then show that the use of racial criteria in any context, including redistricting to ensure representation, triggers strict judicial scrutiny of constitutionality that can only be satisfied if the racial classification is necessary to further a compelling state interest. Although decisions in the areas of school segregation and employment discrimination indicate that courts generally recognize such an interest in remedying the effects of past discrimination against a racial minority, the Note will suggest that the courts must scrutinize any proposed remedy in light of the availability of "less drastic" means to advance that interest and the extent of adverse impact that may be caused by the benign racial classification. The Note will argue that such an approach is particularly crucial in the context of redistricting, because proportional representation is an uncertain remedy for dilution of minority group voting power and because there are demonstrable adverse effects on nonminority groups. It concludes that, under a strict scrutiny analysis, the use of a benign racial classification to advance proportional representation is not a constitutionally permissible remedy for the effects of prior dilution of minority voting power.

In order to determine whether proportional representation is constitutionally mandated, it is first necessary to define the nature of the rights involved. The right to vote in state and federal elections is secured by the Constitution.[12] The fifteenth amendment explicitly proscribes its denial or abridgment "by the United States or by an State on account of race, color, or previous condition of servitude." Clearly, racial gerrymandering that completely disenfranchises some citizens on the basis of their race is unconstitutional.[13] In addition, the Supreme Court has recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[14] Thus, the Court has developed the principle of "one person, one vote," which requires a substantial equality of population between legislative districts, to assure that every vote carries equal

12. *See* Reynolds v. Sims, 377 U.S. 533, 554 (1964).
13. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960).
14. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

weight.[15] To ensure further the integrity of the individual's ballot, the Court has also recognized that the equal protection clause secures the individual's right to participate on an equal basis in the political life of his community.[16] This right to "full and effective participation"[17] may be abridged when the political processes leading to the nomination and election of candidates are not fully open to members of a particular group.[18] Specifically, impermissible dilution can occur through reapportionment if a redistricting scheme purposefully renders the support of a particular group of voters unnecessary to a successful campaign and thereby enables candidates to ignore their interests and needs.[19]

Thus, in scrutinizing claims that a redistricting scheme dilutes the franchise, the Supreme Court has demonstrated that it considers the right to vote essential to the continued vitality of a democratic society, for "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."[20] However, the Court has been careful to distinguish between the constitutionally protected right of individuals to vote and the unsupported claim of groups to representation.[21] Thus, it has stressed that "the rights sought to be vindicated in a suit challenging an apportionment scheme are 'personal and individual.' "[22] The notion that a particular interest group is entitled to representation was firmly laid to rest in *Whitcomb v. Chavis*.[23] Although the Court acknowledged the right of the legislative *district* to have a representative, it explicitly rejected the claim of Black ghetto-dwellers that they (or any other groups within the district) were constitutionally entitled to have their interests represented.[24] If, as was held in *Whitcomb*, there is no constitutional right to representation per se, then it follows that there can be no right to proportional

15. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

16. *See* Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Reynolds v. Sims, 377 U.S. 533, 565 (1964); Gray v. Sanders, 372 U.S. 368 (1962).

17. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

18. *See* Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

19. White v. Regester, 412 U.S. 755 (1973). *Cf.* Whitcomb v. Chavis, 403 U.S. 124 (1971).

20. Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

21. *See* Reynolds v. Sims, 377 U.S. 533, 561 (1964).

22. Reynolds v. Sims, 377 U.S. 533, 561 n.39 (1964), *quoting* South v. Peters, 399 U.S. 276, 280 (1950) (Douglas, J., dissenting).

23. 403 U.S. 124 (1971). *See* Beer v. United States, 44 U.S.L.W. 4435, 4437 n.8 (U.S. March 30, 1976). For discussions of the existence of a right to representation, *see* Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 46; Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 729 (1969); Note, *Minority Representation*, 50 N.C. L. REV. 104 (1971). *But see* Note, *Compensatory Racial Reapportionment*, 25 STAN. L. REV. 84 (1972).

24. For a discussion of this holding, see Taylor v. McKeithen, 499 F.2d 893, 905-06 (5th Cir. 1974).

representation. Indeed, in *Kilgarlin v. Hill*,[25] the Court rejected a claim that a redistricting plan was unconstitutional because it failed to provide for minority control in a number of districts roughly proportional to the minority population. The Court explained that the Constitution neither mandates the election of a member of a particular interest group nor establishes a right to representation by a person of the same race.[26]

Although there is no constitutional right to proportional representation, the fourteenth amendment does guarantee every person the right to have access to the political processes of the community. Thus, the Court has found that, in the context of reapportionment, a constitutional infirmity arises not when there is a disparity between a minority group's percentage of elected representatives and its percentage of total electors, but when a redistricting scheme is purposefully designed to render the support of minority group members unnecessary to a candidate's campaign and thereby dilutes the minority vote.[27] Two recent Supreme Court cases illustrate

25. 386 U.S. 120 (1967), *affg. per curiam*, 252 F. Supp. 404 (S.D. Tex. 1966).

26. In numerous reapportionment cases, the courts have refused to require legislatures to consider common interests in the formulation of voting districts. *See, e.g.*, Wells v. Rockefeller, 394 U.S. 542 (1969); Ferrell v. Oklahoma *ex rel.* Hall, 339 F. Supp. 73 (W.D. Okla.), *affd.*, 406 U.S. 939 (1972); Gilbert v. Sterret, 509 F.2d 1389, 1391 (5th Cir. 1975) (redistricting plan not invalid "merely because its lines [were] not carefully drawn to ensure representation to sizeable racial, ethnic, economic, or religious groups"); Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir.), *cert. denied*, 407 U.S. 925 (1972) (Black community not entitled to "two predominantly Black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts"); Ince v. Rockefeller, 290 F. Supp. 878, 884 (S.D.N.Y. 1968) (neither the concept of one person, one vote nor the provisions of the fourteenth or fifteenth amendments guarantee to any racial or national group the right to representation according to color). *See also* Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *affd. sub nom.* East Carroll Parish School v. Marshall, 44 U.S.L.W. 4320 (U.S. March 8, 1976); Cousins v. City of Chicago, 503 F.2d 912 (7th Cir. 1974); Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974); Mann v. Davis, 245 F. Supp. 241 (E.D. Va.), *affd.*, 382 U.S. 42 (1965). The Supreme Court has similarly rejected claims for proportional representation on grand or petit juries. *See* Swain v. Alabama, 380 U.S. 202, 211 (1965) ("[N]either the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group [because] proportional representation is not permissible"); Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945).

27. Dilution questions typically arise in cases challenging the creation or continuation of multimember districts, where a large segment of the population, but less than a majority, consists of minority residents. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965). However, votes of an ethnic or other interest group may be diluted through the use of single member districts as well. An area of heavily concentrated minority population may be "cracked" into several pieces, each of which is added to a district with a larger white majority, thus creating new districts, all with white majorities. The Supreme Court has never explicitly held this technique unconstitutional, but it has implied that the formulation of "cracked" districts after a long history of bias and franchise dilution in drawing apportionment plans may be unconstitutional. *See* Taylor v. McKeithen, 407 U.S. 191, 194 n.3 (1972).

the phenomenon of impermissible "dilution." In *White v. Regester*,[28] the Court, in considering a challenge to an apportionment scheme that included multimember districts, concluded that nomination and election procedures and a history of overt discrimination against Blacks in local politics[29] combined effectively to exclude Blacks from participation in the election process. The Court noted that Black support was unnecessary to a successful campaign and that local politicians relied on racist tactics to defeat candidates supported by the Black community.[30] In contrast, in *Whitcomb v. Chavis*,[31] the Supreme Court overturned a finding of unlawful dilution where there was no evidence of discrimination against Blacks in local politics and where it was shown that Black support was actually crucial to the success of Democratic candidates. Further, the Court refused to accept a finding of dilution simply because ghetto residents lacked a voice to express their policy view: "[T]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes."[32]

These two opinions clearly indicate that the Constitution proscribes interference with the right of minority voters to exert influence

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The minority population may also be "packed" into a single district and thereby influence elections in only one district, even when, if the population were distributed, it could be large enough to affect the vote in several districts. The plaintiffs in Wright v. Rockefeller, 376 U.S. 52 (1964), attacked the plan adopted by the New York legislature on these grounds, but the Court found no proof that the districts had been created along racial lines or that the legislature acted upon racial motivations.

In a "stacked" district, minority voting strength is diluted by combining concentrations of minority voters in an irregularly shaped district with greater concentration of Whites to create over-all White majorities. Although the courts have not held "stacked" districts unconstitutional per se, a "stacked" reapportionment plan presumably will not withstand constitutional attack if racial intent or invidious discrimination is proved. *See* Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965); WMCA v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y.), *affd.*, 382 U.S. 4 (1965), *vacated*, 384 U.S. 887 (1966). For a more complete discussion of gerrymandering techniques generally, see Tayler, *Court Versus Legislature: The Sociopolitics of Malapportionment*, 27 LAW & CONTEMP. PROB. 390, 400 (1962). For such a discussion in a racial context, see Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 402-03 (1973).

28. 412 U.S. 755 (1973).

29. Several devices were then being used in Texas to stifle Black participation in politics: (1) a majority, rather than a plurality, vote was a prerequisite to nomination in primary elections; (2) a "place" rule was enforced that limited candidacy from a multimember district to a specific place on the ballot and thereby rendered the election for each position a head-to-head contest, thus accentuating racial differences when they arose; (3) at-large candidates were not required to reside in any particular geographic subdivisions, and thus all the district representatives tended to come from the same area. Moreover, the Court noted that only two Blacks had ever served on the delegation representing the county in question, despite a large Black population. *See* 412 U.S. at 766-67.

30. *See* 412 U.S. at 767.

31. 403 U.S. 124 (1971).

32. 403 U.S. at 124.

in the political arena, but does not establish an affirmative right to elect a candidate of a particular race or viewpoint: "[A]ccess to the political process and not population [is] the barometer of dilution of minority voting strength."[33] Thus, when a redistricting plan renders the support of minority voters unnecessary to a successful campaign, thereby depriving them of a meaningful role in the election process, dilution has clearly occurred. Although underrepresentation may provide evidence that dilution has occurred, it is important to distinguish between the two concepts. Dilution occurs when an individual is deprived of his constitutional right of access to the political process, while representation refers to the claim (which has never been recognized as a constitutional right) that an individual is entitled to a voice in the legislature to further his particular interests. The lower courts, however, have not always recognized the important distinction between these two concepts. For example, in *Wilson* the court simply misinterpreted the dilution cases when it found that the "dilution of non-White *representation* through the use of unlawful devices"[34] was unconstitutional. Because the Constitution provides a right to access, and not to representation, the inability of a racial minority to obtain legislative seats in proportion to its population cannot, in itself, constitute a constitutional violation.

The distinction between the right to "representation" and the right to "access" also helps to clarify the role the Court has played in the reapportionment area. The Supreme Court's refusal to recognize a right to representation not only indicates an awareness of the limits of the constitutional right to vote, but also serves to deter the judiciary from intruding too deeply into what has aptly been described as the "substance of the political process."[35] If the courts attempt to ensure the accommodation of particular interests in the legislature, they will be forced to resolve value-laden political questions, such as which groups deserve representation, the number of representatives that should be allocated to each group, and the particular interest category into which each individual must be placed.[36] Clearly, the Supreme Court has recognized that, were it to guarantee representation to one racial group, then members of all political, religious, social, and ethnic groups might legitimately demand similar treatment.[37] Moreover, representation is essentially a political problem simply because representatives are chosen, and the character of the legislature is

33. Zimmer v. McKeithen, 485 F.2d 1297, 1303 (5th Cir. 1973), *affd. on other grounds sub nom.* East Carroll Parish School v. Marshall, 44 U.S.L.W. (U.S. March 8, 1976).

34. 510 F.2d at 525 (emphasis added).

35. Irwin, *supra* note 23, at 748.

36. *Id.* at 753. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (Douglas, J., dissenting); Auerbach, *supra* note 23 at 36-38; Note, 50 N.C. L. REV. 104, *supra* note 23, at 110.

37. *See* Whitcomb v. Chavis, 403 U.S. 124, 156-57 (1971).

thereby determined, in an electoral contest: "[a]s our system has it, one candidate wins, the others lose."[38] To guarantee a right of representation, the judiciary would have to involve itself directly in the election process and dictate the outcome of the contest. Thus, the Court has recognized that "the apportionment task, dealing as it must with fundamental 'choices about the nature of representation' . . . is primarily a political and legislative process."[39]

By acknowledging the right of *access*, however, the Court does not force the judiciary to influence the outcome of political elections. Rather, where a claim of dilution is made, the courts need only assess the ability of minority voters to participate on an equal basis with other citizens in the community's political processes. If minority interests are not ignored and minority voters participate freely in a nondiscriminatory candidate selection process, then the judicial task is finished; the inability of minority candidates to win is of no concern to the courts, except in so far as persistent electoral failures might indicate interference with the right of voters to access.[40] In distinguishing between access and representation, the Court has thus concluded that, in a democratic society, while every citizen has a right to participate in the process of nominating and selecting representatives of the people, no individual (or group) has a constitutionally protected right to a personal lobbyist in the legislature.

The question that next arises is whether proportional representation, if not constitutionally required, is constitutionally permissible. Specifically, where the right of members of a minority group to participate in the political process has been diminished because of a history of discrimination, may a court or legislature attempt to alleviate the effects of such prior discrimination by establishing a racial districting scheme designed to provide proportional representation?

Under modern constitutional analysis, although racial classifications are not unconstitutional per se,[41] they are generally considered inherently suspect and thus subject to strict judicial scrutiny.[42] This means that, if the government wishes to use a racially based classification, it must demonstrate that the use of this classification is necessary to further a compelling state interest and that its use is the least

38. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

39. Gaffney v. Cummings, 412 U.S. 735, 749 (1973), *quoting* Burns v. Richardson, 384 U.S. 73, 92 (1966).

40. If, for example, Black candidates have been slated, but have always lost, this may indicate that they have been granted merely token participation. *See generally* Whitcomb v. Chavis, 403 U.S. 124, 149-53 (1971).

41. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 19 (1971); Loving v. Virginia, 388 U.S. 1, 11 (1967); Porcelli v. Titus, 431 F.2d 1254, 1257 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

42. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964). For a thorough discussion of the equal protection analysis, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

drastic means of accomplishing the desired end.[43] In the past, cases dealing with racial discrimination have generally involved discrimination against racial minorities; it is only recently that the courts have decided cases of "reverse" discrimination. The Supreme Court has not yet determined whether, and under what circumstances, "benign" classifications may be utilized.[44] The Court's failure to resolve the issue is reflected in disagreements among the lower courts and accounts for the absence of uniform principles or policies in this area.[45]

The uncertainty and confusion felt by the courts in reverse discrimination cases make it extremely difficult to discern the standards of scrutiny they are applying to such racial classifications. Despite the lack of a uniform approach, general trends can be gleaned from the courts' decisions and applied to the specific problems raised when proportional representation is used as a remedy for dilution of minority votes. It should be made clear at the outset that the trends are a composite generalization of determinations made by courts that often fail to articulate clearly the precise analysis they themselves are using. Nevertheless, it is submitted that the behavior of the courts taken as a whole is indicative of a viable approach to the benign classification problem—an approach the courts would do well to make more explicit.

It appears that the courts are applying a strict scrutiny test to the use of benign classifications, not one that invokes a mechanical finding of invalidity of such classifications, but a test that attempts to balance the state's compelling interest in framing effective remedies (both judicial and legislative) to combat the evils of race discrimination against the harm caused to nonminority group members because of the use of racial criteria.[46] Specifically the factors that weigh in this balance appear to be the extent of the invidious racial discrimination, the state's interest in eliminating the effects of such discrimina-

43. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 375 (1971); Loving v. Virginia, 388 U.S. 1 (1967). The same analysis is applied in cases involving restrictions upon fundamental interests, such as voting. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

44. The Court avoided consideration of this issue in DeFunis v. Odegaard, 416 U.S. 312 (1974), a case involving preferential admissions to law school, when it held that the issue was moot because the plaintiff had been attending classes and would be allowed to graduate.

45. *See* Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 12 (1975) ("[O]pinions have often become mired in traditional constitutional jargon . . . and thus frequently obscure the truly difficult and significant issues raised by preferential remedies. As a consequence, no uniform legal principles or policy imperatives have emerged . . .").

46. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting), where Justice Marshall noted his disagreement with the view that "equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality." According to Justice Marshall, the Court has actually applied a "spectrum of standards" that "comprehends variations in the degree of care with which the Court will scrutinize particular classifications . . . ." 411 U.S. at 98-99.

tion, the efficacy of the proposed preferential remedy to achieve the end sought, the possibility of furthering this interest through the use of neutral remedies, and the adverse impact the preferential remedy will have on nonminority group members.

The balancing approach within a strict scrutiny framework can be tested by examining four situations involving racial classifications: de jure and de facto segregation of schools, preferential employment, and "fictional" seniority. Although the courts in those varying situations have not weighed the factors uniformly or consistently, and have occasionally even disregarded some entirely, two tendencies will be apparent. First, the courts are *more* willing to find a compelling state interest and less strict in requiring a showing that no less drastic alternatives exist when the purpose of a racial classification is to remedy the effects of past state-promoted discrimination against a racial minority. Second, the courts appear to be *less* willing to allow benign racial classifications to be used when they will impose a significant adverse impact upon the nonminority group.

Voluntary action by a school board to integrate the schools within its jurisdiction has survived constitutional attack on several occasions.[47] The simplest cases have involved desegregating school systems in which overt discrimination by state officials has resulted in "dual" systems. In such cases the courts have held that the Constitution clearly permits efforts to eliminate segregation, even if such efforts require the use of racial classifications.[48] Thus, the Court has pointed out that school boards operating dual school systems are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[49] The state violates the equal protection clause when it discriminates on the basis of race in its schools, and continues to violate the Constitution until the segregated system is eliminated.[50] It makes no difference whether the school board voluntarily dismantles the segregated system or whether a termination order issues from a court;[51] in either case, the use of racial criteria is permissible when necessary to ensure desegregation.[52]

47. *See, e.g.*, Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968).

48. *See* McDaniel v. Barresi, 402 U.S. 39 (1971); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965).

49. Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

50. *See* Wanner v. County School Bd. of Arlington, 357 F.2d 452 (4th Cir. 1966); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965).

51. *Compare* Wanner v. County School Bd. of Arlington, 357 F.2d 452 (4th Cir. 1966), *with* Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965). *See also* McDaniel v. Barresi, 402 U.S. 39 (1971).

52. It is clear from the exasperation of the Court with the foot-dragging behavior of many school boards following the decision in Brown v. Board of Educ., 347 U.S. 483 (1954), that alternatives were not feasible. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

As one commentator has put it, "In the school desegregation cases, both the compelling governmental interest in integration and the absence of workable, less drastic means are well documented, making it easy for the Supreme Court to apply strict scrutiny to desegregation orders and yet allow the lower courts a great deal of discretion."[53] The de jure segregation cases, moreover, represent perhaps the clearest situation in which the need to use a benign racial classification outweighs the adverse impact upon the nonminority group: The impact of benign classification upon nonminority students is slight because no one has a right to a segregated education.[54]

In the absence of de jure segregation, the courts will not require, but will permit, state action to eliminate de facto racial imbalances by the use of racial criteria.[55] For example, in *Springfield School Committee v. Barksdale*,[56] the First Circuit approved a school board plan that utilized racial criteria to correct a racial imbalance. The court implied that the state's interest in providing its school children with an education free from the taint of racial prejudice was sufficiently compelling to meet the strict scrutiny test: "The . . . proposed action does not concern race except insofar as race correlates with proven deprivation of educational opportunity. This evil satisfies whatever 'heavier burden of justification' there may be."[57] A number of the lower courts have quoted this language with approval and have reached the same result as the First Circuit in *Barksdale*.[58] Furthermore, the Supreme Court has indicated, in dictum, that it would permit a school board to use racial criteria to correct a racial imbalance, even in the absence of a showing of de jure segregation: "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities."[59] Thus, application of

53. Edwards & Zaretsky, *supra* note 45, at 24.

54. *See* DeFunis v. Odegaard, 416 U.S. 312, 336 (1974) (Douglas, J., dissenting).

55. *See* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

56. 348 F.2d 261 (1st Cir. 1965).

57. 348 F.2d at 266, *quoting* McLaughlin v. Florida, 379 U.S. 184, 194 (1964). The district court appears to have found the compelling state interest test used in *McLaughlin* also applicable when benign discrimination is involved.

58. *See, e.g.*, Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968). *Cf.* Pride v. School Bd. of Brooklyn, 488 F.2d 321 (2d Cir. 1973) (compelling state interest test not applicable because the state action at issue had the objective and the effect of reducing segregation and use of racial criteria therefore permissible).

59. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

the strict scrutiny, balancing approach in the de facto segregation cases leads to the conclusion that any slight adverse impact benign racial classifications might have upon nonminority children is outweighed by an important constitutional interest—ensuring access to educational opportunities without regard to race.[60]

The judicial analysis of preferential employment schemes[61] has also involved balancing the need to employ racial criteria to achieve equality against the adverse impact such schemes have on nonminority group members. However, more than in other areas where strict scrutiny is applied to benign racial classifications, the results in preferential employment cases appear inconsistent and the courts have failed to explain why the balance has been struck in a particular direction. Although the courts frequently do not set out the basis for their decisions, those courts that have allowed the benign use of racial criteria in the employment context have obviously been persuaded that putting an end to racial discrimination in the labor sector is a compelling state interest that must be advanced by racial preferences[62] because "neutral" ("less drastic") remedies have failed.[63] Those courts that have struck down or have refused to grant preferences based upon racial criteria have tended to focus on the adverse impact such preferences have upon nonminority group members, and have obviously given less weight to the effects of prior discrimination against minorities.[64]

60. The reluctance of the courts to order the use of racial criteria in the absence of de jure segregation is perhaps indicative of the judgment that, in the absence of evidence of overt discrimination by the state, such sensitive policy issues are better left to a more politically responsive body. *See generally* Edwards & Zaretsky, *supra* note 45, at 24. Professor Edwards suggests that there is a "continuum in the level of scrutiny accorded a preferential remedy that depends on the degree of legislative approval of that remedy." *Id.* Scrutiny is strictest when there is no legislative mandate, and most lenient when there is an explicit legislative mandate. Thus, the courts scrutinize legislative remedies more leniently than they do judicial preferential remedies.

61. In this context, "preferential employment schemes" refers to preferences in hiring and promotion and to the granting of fictional seniority. *See generally* Edwards & Zaretsky, *supra* note 45; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

62. *See, e.g.*, Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (goal of equal opportunity so compelling that school board may not only be permitted but may be required to prefer Blacks in hiring); Associated Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9, 17-18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (preferential hiring of Black workers in construction industry serves compelling state interest of providing equal employment opportunity and reducing racial tension).

63. *See, e.g.*, NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974) (preferential remedy essential to eliminate the effects of employment discrimination). But other courts have refused to approve preferential remedies because a "less drastic" alternative was thought to be available. *See, e.g.*, Harper v. Mayor & City Council, 359 F. Supp. 1187, 1214 (D. Md.), *affd. sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

64. *See, e.g.*, Chance v. Board of Examiners, No. 75-7161 (2d Cir. Jan. 19, 1976).

Typical of those cases that have upheld the use of preferential remedies is *Associated General Contractors of Massachusetts v. Altshuler*,[65] in which a group of construction companies challenged an affirmative action plan promulgated by the governor of Massachusetts. Under this plan all state construction contracts were to include a clause obligating the general contractor to hire a certain percentage of minority workers. The First Circuit subjected the plan's use of racial criteria to strict scrutiny and held that because of the "compelling need . . . to remedy serious racial imbalances in the construction trades,"[66] the program did not violate the equal protection clause. The court reasoned that the long history of discrimination and the continuing racial imbalance in the construction industry compelled the conclusion that preferential remedies were essential to the achievement of equal employment opportunity. Furthermore, the court pointed out that the racial imbalance in the construction industry undermined efforts to achieve equal opportunity elsewhere in the economy and contributed to racial tension.[67] Similarly, in *NAACP v. Allen*,[68] the Fifth Circuit approved a plan that required a one-Black-to-one-White hiring ratio to be in effect until twenty-five per cent of Alabama state troopers and support personnel were Black. The court strictly scrutinized the plan and found that the state's compelling interest in ending unconstitutional racial discrimination justified a "temporary, carefully circumscribed resort to racial criteria, whenever . . . it represents the only rational, non-arbitrary means of eradicating past evils."[69]

Thus, the courts that have upheld the use of preferential remedies focus on the compelling need to afford relief that will be effective and, in their written opinions, often give little more than cursory attention to the adverse impact upon nonminority group members. One court that purported to deal with the problem simply quoted a government finding that preferential hiring goals could be met " 'without adverse impact on the existing labor force.' "[70] The failure of the courts to deal explicitly with the problem of adverse impact may mean either that there is no adverse impact[71] or that a court has

65. 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). *See* Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Southern Ill. Builders Assn. v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Assn. of E. Penn. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

66. 490 F.2d at 18.

67. *See* 490 F.2d at 18.

68. 493 F.2d 614 (5th Cir. 1974).

69. 493 F.2d at 619.

70. Contractors Assn. v. Shultz, 442 F.2d 159, 173 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971).

71. A preferential hiring remedy would impose no adverse impact if, in the industry involved, the demand for workers exceeded the supply, thus enabling the employer to hire minority workers while continuing to follow the same hiring practice with respect to other applicants.

struck the balance in favor of the need for preferential treatment. In all such cases, the courts should articulate the basis for their decisions in order to provide clear guidelines for lawful conduct.

In those cases in which they refuse to allow the use of preferential remedies, the courts generally emphasize the adverse impact such remedies have on nonminority group members. For example, in the recent case of *Kirkland v. New York State Department of Correctional Services*,[72] the Second Circuit upheld a finding by the trial court that a civil service examination unconstitutionally discriminated against Blacks and Hispanics, but reversed that part of the lower court's order that would have required employment of a racial quota. The court distinguished prior cases in which it had allowed the use of quotas: "In each of these cases, there was a clear-cut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of identifiable reverse discrimination. In the instant case, there is insufficient proof of the former and substantial evidence of the latter."[73] The court did seem to imply, however, that it might approve a benign racial quota in spite of the existence of an adverse impact, if a sufficiently compelling governmental interest was presented.[74]

The concern of the courts with the adverse impact of reverse discrimination was further illustrated in *Chance v. Board of Examiners*[75] where the Second Circuit examined the use of preferential racial quotas in the context of "fictional" seniority.[76] Plaintiffs in *Chance* opposed New York City's use of a "last hired, first fired" plan for dismissing supervisory personnel, on the ground that the plan discriminated against recently hired employees who had the least seniority. The district court ordered the city to employ a quota system that would prevent a certain percentage of minority supervisors from being laid off. This meant, of course, that more senior White workers would be laid off in place of less senior minority employees.[77] The Second Circuit reversed the district court's order, emphasizing the adverse impact such a quota would have on white employees: "To require a senior, experienced white member of such a group to stand

72. 520 F.2d 420 (2d Cir. 1975).
73. 520 F.2d at 427.
74. *See* 520 F.2d at 430.
75. No. 75-7161 (2d Cir. Jan. 19, 1976).
76. "Fictional" seniority generally refers to upward adjustments of the seniority status of minority workers to a level theoretically equivalent to that which they would have had "but for" unlawful discrimination. It may also involve transforming departmental seniority into plantwide seniority, giving credit for time actually worked, or simply increasing the seniority status of minority workers who would have been hired had the employer not discriminated, giving credit for time never actually worked. *See* Edwards & Zaretsky, *supra* note 45, at 41-46; *Developments in the Law, supra* note 61, at 1155-65 (1971); Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975).
77. *See* No. 75-7161, at 6592.

aside and forego the seniority benefits guaranteed him . . . solely because a younger, less experienced member is Black or Puerto Rican is constitutionally forbidden reverse discrimination."[78] Although the court did endorse "fictional" seniority as a remedy in cases in which discrimination against an identifiable minority group member had been proved, it distinguished that situation from general, group remedial plans: "If a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination, he may, in some instances, be entitled to preferential treatment—not because he is Black, but because, and only to the extent that, he has been discriminated against."[79] The court's willingness to allow a limited use of fictional seniority[80] follows from its reasoning in *Kirkland*. It appears ready to restrict the use of preferential remedies to cases in which there has been a showing of overt discrimination and in which the adverse impact upon nonminority workers is slight. In fact, by allowing the circumscribed use of racial quotas in hiring cases (in which there has been a clear-cut showing of invidious racial discrimination and no showing of reverse discrimination), but limiting the use of fictional seniority to cases where overt discrimination against an *identifiable individual* has been shown, the court is implying that the use of preferential remedies in the area of layoffs has a greater impact upon White workers and thus must be more carefully limited.[81] This distinction appears to have been adopted in other cases and approved by at least one commentator.[82]

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78. No. 75-7161, at 6596 (footnote omitted).

79. No. 75-7161, at 6596. This approach is consistent with that adopted in Franks v. Bowman Transp. Co., 44 U.S.L.W. 4356, 4363-65 (U.S. March 24, 1976), where the Supreme Court construed Title VII of the Civil Rights Act of 1964 to allow seniority relief for identifiable victims of illegal hiring discrimination. No arguments in favor of granting seniority to those not actually discriminated against, as required by the district court order in *Chance*, were made.

80. The court explained that it will follow the "rightful place" doctrine to the extent of using plant seniority instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers into more favorable positions. Application of this doctrine will put minority workers in the approximate position on the seniority list that they would have occupied had they not been subjected to discriminatory treatment. However, it does not involve the displacement of White workers, a result the court considered unacceptable, but only involves filling vacancies. *See* No. 75-7161, at 6596. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 661 (2d Cir. 1971); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *Cf.* Franks v. Bowman Transp. Co., 44 U.S.L.W. 4356, 4365 (U.S. March 24, 1976) (retroactive seniority did not deprive other employees of "indefeasibly vested rights").

81. The court distinguished the use of racial quotas in hiring from their use in adjusting seniority status and indicated that because the seniority preference would impose a much greater impact on White workers, the cases approving preferential hiring quotas do not support the institution of preferential grants of seniority. No. 75-7161, at 6595-96.

82. *See* Franks v. Bowman Transp. Co., 44 U.S.L.W. 4356 (U.S. March 24, 1976), *revg.* 495 F.2d 398, 417-18; Edwards & Zaretsky, *supra* note 45, at 6595-96.

Although the school and employment cases that have been examined are only a small sampling of the burgeoning case law on the use of benign classifications, the strict scrutiny analysis adopted in these cases is representative of the general approach of the courts.[83] The cases examined here can be seen as lying along a spectrum ranging from situations in which the use of racial criteria is clearly permissible, to situations in which the balancing of factors becomes much more difficult and might result in the proscription of racial classifications. At one end of the spectrum are the de jure segregation cases, in which the evidence of both overt discrimination and the failure of neutral remedies is clear and convincing, while the adverse impact is negligible. Emphasizing the importance of society's interest in desegregation, the courts have not hesitated to order or uphold

See also Acha v. Beame, No. 75-7388 (2d Cir. Feb. 19, 1976) (involving sex discrimination); Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Commn., 482 F.2d 1333, 1341 (2d Cir. 1973) ("[W]hile this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes"); Papermakers Local 189 v. United States, 416 F.2d 980, 995 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) ("[I]t is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs" (emphasis original)).

83. In Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973), the court held that the compelling state interest test was the appropriate standard by which to scrutinize an arguably benign racial quota established by the state housing authority. In order to avoid the phenomenon of "White flight," which commonly occurs when the Black population in an area reaches a certain level, the authority established a quota for minority occupancy at a particular housing project and denied admission to non-White families once the quota was filled. The authority contended that failure to use such a quota would have led to a high concentration of Blacks, the departure of the remaining Whites, and the creation of a "pocket ghetto." The court agreed with the housing authority and permitted the use of racial quotas, provided that the authority sustained a "heavy burden of proof" that such action was necessary to avoid segregation.

In Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967), the Fifth Circuit upheld the purposeful inclusion of two Black citizens on a grand jury venire list, despite the settled constitutional principle that jury selection procedures may not discriminate on the basis of race. Since discrimination against Blacks could easily have been proved through statistical evidence of the historical lack of Black jurors, the state's strong interest in preventing overturned convictions justified the use of racial criteria. However, the court stated that such criteria could never be used to obtain jury panels that were proportioned according to race, since jurors should be selected as individuals, on the basis of their individual qualifications, and not as members of a particular race. Moreover, the court observed that a selection process aimed at a proportional balance places an artificial and unacceptable limit on participation.

In DeFunis v. Odegaard, 507 P.2d 1169, *vacated*, 46 U.S. 312, *judgment reinstated*, 84 Wash. 2d 617, 529 P.2d 438 (1974), the Washington supreme court held that the compelling state interest test was the appropriate yardstick in a case challenging the use of racial criteria in law school admissions. The court considered this standard appropriate in view of the fact that the admissions policy was certainly not benign with respect to nonminorities who were displaced by it.

the use of racial classifications.[84] The de facto segregation cases present somewhat more of a problem, and are slightly further along the spectrum. Here, although the evidence of overt discrimination is not as great, the importance of the goal to be achieved is undiminished, the failure of neutral remedies is well documented, and the adverse impact on nonminority groups remains negligible. In these cases, the courts have been unwilling to order, but have allowed the use of, benign racial classifications.[85] Slightly further along the spectrum are the preferential hiring cases. Here, again, there is usually evidence of overt discrimination, a clear interest in providing equal employment opportunity, and a general failure to find effective neutral remedies. In these cases, however, the adverse impact varies with industry conditions. The willingness of courts to allow or order the use of preferential remedies depends upon the degree of adverse impact they perceive.[86] Still further along the spectrum are the fictional seniority cases. Although discrimination in these cases may be more indirect,[87] the factors to be weighed here are generally the same as in the hiring cases, with the important difference that the evidence of a severe adverse impact will often be clear. It should not be surprising, then, that the courts generally have permitted only a most limited use of such remedies.[88] With this analysis as a guide, it is now possible to place on the spectrum a scheme designed to provide proportional representation by race.

Because the use of racial criteria can only be justified as a remedial device,[89] it is first necessary to determine whether prior discriminatory practices in a community have diluted the voting strength of minority citizens. Whether discriminatory devices have been used to dilute minority voting strength is a question that must be determined upon the facts of each case. Literacy tests, "grandfather" clauses, gerrymandered districts, and primaries excluding minority participation have all been used to prove dilution.[90] In

84. *See* notes 48-54 *supra* and accompanying text.

85. *See* notes 55-60 *supra* and accompanying text.

86. *See* notes 65-74 *supra* and accompanying text.

87. Overt discrimination in the seniority cases is more indirect than in the hiring cases because it is one step further removed from the actual discrimination alleged. Not only must it be shown that, "but for" discrimination, a Black applicant would have been hired, as is necessary in the hiring cases, but one must also find that he would have been hired at a particular time and would have continued to be employed by that employer and thereby would have gained increased seniority.

88. *See* notes 75-82 *supra* and accompanying text.

89. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16, 32 (1970).

90. *See, e.g.*, Graves v. Barnes, 343 F. Supp. 704, 725 (W.D. Tex. 1972), *affd. sub nom.* White v. Regester, 412 U.S. 755 (1973); United Jewish Organizations of Williamsburgh v. Wilson, 510 F.2d 512, 525 (2d Cir. 1974), *cert. granted*, 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975) (No. 75-104); Taylor v. McKeithen, 333 F. Supp. 452, 456 (E.D. La. 1971), *revd.*, 457 F.2d 796 (5th Cir. 1971), *remanded*, 407 U.S. 191 (1972), *affd.*, 499 F.2d 893 (5th Cir. 1974) (racially gerrymandered dis-

addition, empirical studies of voting and electoral patterns may demonstrate that minority group members have been denied access to the political process.[91] The more pervasive the use of discriminatory devices intended to dilute minority voting strength, the greater is the likelihood that severe dilution has taken place, and, therefore, the greater is the need for drastic remedies, such as racial redistricting.

Once the existence of unlawful dilution has been proved, the state clearly has a duty to eradicate the sources of discrimination[92] by at least requiring neutral electoral procedures and redistricting. It must eliminate all discriminatory devices in order to meet its constitutional obligation to provide equal protection of the laws. In this situation, a legislature or a court may also decide that the alleviation of harmful effects[93] on minority political access caused by prior discrimination requires proportional representation as a remedy. In considering whether such a remedy would be constitutional, a court must balance the compelling interest in ensuring minority political access against the general impermissibility of racial criteria, by examining the effectiveness of the particular remedy (proportional representation) in furthering that interest, the availability of "less drastic" alternatives that would be as effective, and the degree of adverse impact on nonminority groups caused by the remedy.

It has been argued that the interest of ensuring political access cannot be furthered merely by requiring that district lines be drawn in a nondiscriminatory fashion:[94] To eliminate discrimination, a state

tricts). *Cf.* Guinn v. United States, 238 U.S. 347, 364-65 (1915) (discriminatory grandfather clauses held invalid).

91. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Supreme Court reasoned that a low voting rate is relevant to voting discrimination "for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S. at 330. Remedial provisions could therefore be imposed on states meeting the coverage formula of the Voting Rights Act of 1965 because of the past use of certain tests and devices and a voting rate below fifty per cent. Similarly, in Graves v. Barnes, 343 F. Supp. 704, 726 n.17 (W.D. Tex.), *affd. sub nom.* White v. Regester, 412 U.S. 755, 766 (1972), the court based a finding of dilution in part upon the statistical evidence that only two Black representatives had ever served on the county delegation despite a large Black population.

92. After Brown v. Board of Educ., 347 U.S. 483 (1954), for example, it is clear that the state has a constitutional duty to eliminate de jure segregation.

93. Arguably, the effects of discrimination can be distinguished from the source of discrimination, leaving the state obligated only to remove the source. However, it is questionable whether discrimination has been eliminated when its effects remain. Thus, the duty to eliminate unconstitutional discrimination may extend to a duty to eradicate its effects as well. *See* Louisiana v. United States, 380 U.S. 145, 154 (1965) (courts have duty to render a decree which will, so far as possible, eliminate discriminatory effects of past); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967) (adequate redress of discriminatory practice calls for liquidation of the state's system of de jure segregation and the organized undoing of the effects of past segregation). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. County School Bd., 391 U.S. 430, 439 (1968).

94. Presumably, the state could be ordered simply to ignore factors such as race, color, and national origin in drawing districting plans. This would leave the legisla-

(or a court) may find it necessary to use racial criteria in order to provide remedies that promise "realistically to work, and . . . to work *now*."[95] Thus, even if redistricting along neutral lines eliminates direct restraints on the exercise of the minority franchise, this remedy may be insufficient to correct the effects of prior dilution because minority voters have come to believe that the political system will ignore their interests. Under such circumstances, is proportional representation not then justified as a necessary means to ensure minority access to the political process by guaranteeing minority control over election results in a particular district?

Although this argument has superficial appeal, it cannot withstand closer scrutiny. The proposed justification of ensuring access rests on the questionable and somewhat racist assumption that an individual's political interests are determined by his race and that racial groups will vote as a bloc. Categorizing voters into interest groups defined by race violates the right of people to be recognized as individuals with a unique combination of interests.[96]

Even assuming that individuals of the same race will have common political interests, it is not clear that the use of a proportional representation scheme can best ensure increased minority access to the political process. To begin with, the theoretical assurance that minority voters in a district *could* elect a representative is no guarantee that individual voters will, in fact, exercise the franchise or become involved in political affairs. Furthermore, if minority voters vote actively as a bloc, they may be able to exert greater influence if their community is split into several districts rather than consolidated into a majority in a single district. For example, if a minority community can be divided into three districts in which it comprises twenty per cent of the voting population, and if in each district the minority vote is necessary to the success of a candidate, then the minority influence may be far greater (and minority access therefore more likely) than if the minority vote were clumped into a single district in which it comprised a sixty per cent majority.[97] Thus, if the

ture completely free to exercise its political discretion and to consider neutral factors such as compactness, area, political persuasion, economic and social interests, historical and geographic boundaries, and contiguous territory. *See* Mahan v. Howell, 410 U.S. 315, 325 (1973); Ferrell v. Oklahoma *ex rel.* Hall, 339 F. Supp. 73, 82 (W.D. Okla. 1972), *affd.*, 406 U.S. 939 (1972).

95. Green v. County School Bd., 391 U.S. 430, 439 (1968). *Accord,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

96. *See generally* Brooks v. Beto, 366 F.2d 1, 24 (5th Cir. 1966), *cert. denied,* 386 U.S. 975 (1967); Auerbach, *supra* note 49, at 46.

97. *See* Taylor v. McKeithen, 499 F.2d 893, 902 (5th Cir. 1974). The dispute over which is more beneficial is starkly illustrated in Wright v. Rockefeller, 211 F. Supp. 460 (S.D.N.Y. 1962), *affd.*, 376 U.S. 52 (1964), where Black plaintiffs attacked a plan that concentrated Black citizens in one district as unconstitutional, 211 F. Supp. at 460-61, while Black intervenors defended it, contending that concentration of minority voters in a single district made them more effective, 211 F. Supp. at 464-65.

goal is to ensure access to the political process by guaranteeing that minority voters will have a significant influence upon candidates, proportional representation may not only be an unnecessary means of achieving this goal, but may actually be less effective than other "less drastic" alternatives.[98]

Proponents of proportional representation as a remedy for dilution fail to recognize that, once discriminatory barriers to access have been removed, the problem is essentially one of encouraging minority voters to take part in the political process of the community. There is no certain correlation between the presence of majority voting strength in a particular district and the involvement of members of that majority in community politics. Rather, promoting minority access requires educating individuals as to their rights and opportunities and building community interest in the political process. Proportional representation actually undermines the development of a healthy political community by official legitimization of the use of racial stereotypes:

> [R]acial electoral registers have no place in a society honoring the Lincoln tradition "of the peole, by the people, for the people." The individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasion, District C by a Catholic, and so on. The racial electoral register system weights votes along one racial line more heavily than it does others votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing districts along racial or religious lines.[99]

Finally, whether or not proportional representation schemes can promote minority access, they should be found impermissible because the purpose (and possible effect) of such schemes is to dilute the voting power of nonminority members and thereby diminish their constitutional right of political access. Although a candidate may, in fact, find it necessary to direct his campaign on cross-racial lines even where a scheme of proportional representation has been put into effect, such a plan is clearly based on the assumption that voters will cast their votes by race. Its purpose is to make nonminority votes

98. Splitting minority groups into several districts where they constitute one of several interest groups rather than the controlling interest group is a less drastic alternative because under these circumstances everyone, minority group members included, would have an equal opportunity to participate. Where the minority group is given a controlling majority, there is a much greater danger that the influence of other district residents will be minimized and that their voting strength will be unconstitutionally diluted.

99. Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting).

superfluous and, thus, to achieve what would ordinarily be considered the unconstitutional objective of diluting votes along racial lines. For example, the scheme challenged in *United Jewish Organizations of Williamsburgh v. Wilson* established districts with sixty-five per cent nonwhite majorities, on the assumption that this percentage was necessary to enable minority voters to dictate election results.[100] If such a plan functions as expected, the ability of White voters to participate in political affairs within the districts will be severely restricted. This adverse impact could be particularly great because, while most remedial racial classifications are used for limited periods of time, racial redistricting is relatively permanent.[101] The court in *Wilson* maintained that no impermissible dilution would result from racial redistricting because the plan would not create disproportionate non-White representation in the legislature as a whole.[102] Obviously, the court was assuming that White voters in a racially proportioned district could have their interests protected by White representatives elected from other districts in the state. But a legislature proportioned according to race in its over-all composition is no guarantee that individuals have had adequate access to the political process.[103] Legislators do not represent racial or other groups, but the citizens residing in their district. Each individual is entitled to effective participation within his own district. Whatever the ultimate racial complexion of the legislature, an apportionment plan creates serious constitutional problems if it is designed to deny equal access to the political process to any citizen because of his or her race. Thus, proportional representation cases should be placed at the far end of the spectrum where strict scrutiny is applied to benign racial classifications. Here, the state has a duty to eliminate invidiously discriminatory devices and a significant interest in alleviating the effects of past discrimination. However, the constitutionality of the use of a scheme of proportional representation to achieve equality of political access is questionable at best. Less drastic, neutral remedies are not only available, but may well be more effective in advancing the state's interest. Moreover, if the proportional representation scheme achieves its legislative purpose of ensuring minority groups the power to dictate election results, the adverse impact upon the nonminority

100. *See* 510 F.2d at 526 (Frankel, J., dissenting), *cert. granted*, 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975) (No. 75-104).

101. The courts emphasize the fact that the use of racial classification is only a temporary expedient of limited duration. *See, e.g.*, Southern Ill. Builders Assn. v. Ogilvie, 471 F.2d 680, 686 (7th Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

102. *See* 510 F.2d at 525.

103. The racial complexion of the legislature may be relevant to the extent that it provides evidence of past discrimination. For example, the fact that only two Black representatives ever served on the multimember delegation representing a Texas county with a large Black population was one of the factors cited by the Court in White v. Regester, 412 U.S. 755 (1973), to support a finding of dilution.

group will be severe.[104] Clearly, if the courts have challenged the validity of racial classifications that cause loss of jobs or seniority, equally strict scrutiny should be applied when the right to an undiluted vote is at stake. Thus, under the analysis of racial classifications used by the courts, proportional representation is neither a constitutionally protected right nor a constitutionally permissible remedy.

104. Those arguing that the courts should apply a permissive standard of review to "benign" racial classifications essentially ignore the question of an adverse impact. *See, e.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); *Developments in the Law, supra* note 42, at 1104-22. *See also* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975).